AVESF 1.1.1

STATE OF IDAHO

DEPARTMENT OF HEALTH AND WELFARE

DIVISION OF ENVIRONMENT
2110 Ironwood Parkway
Coeur d'Alene, Idaho 83814
(208) 667-3524

November 29, 1988

Allan Stockman
Federal Highway Administration
610 East 5th Street
Vancouver, Washington 98661-3893

RE: Avery Landing Petroleum Contamination

Dear Mr. Stockman:

As we discussed in our telephone conversation of November 29, 1988, a meeting will be held at this office on Thursday, December 15, 1988, at 1:00 PM to discuss the petroleum contamination clean-up near Avery, Idaho. The parties to be involved are David Theriault, Potlatch Corporation, and the Shoshone County Public Works Department. Additionally, Joe Baldwin and/or Tim Mosko, from our groundwater unit, will attend. The expected agenda is as follows:

* History - initial investigations and property owner identification
* Regulations and clean-up requirements
* Additional investigations needed
* Clean-up methodologics
* Responsibility for clean-up

We would appreciate you confirming this date on or before Monday, December 12, 1988.

Your cooperation is greatly appreciated.

Sincerely,

DIVISION OF ENVIRONMENTAL QUALITY

Stephen A. Breithaupt
Senior Water Quality Specialist

SAB/pvc

cc: Larry Koenig, IDHW-DEQ, Boise

U.S. Department of Transportation
Federal Highway Administration

Memorandum

Room 312 Mohawk Building
708 S. W. Third Avenue
Portland, Oregon 97204

Subject: State of Idaho Nuisance Action: Avery Landing Area

Date: June 23, 1989

From: Assistant Regional Counsel

Reply to Attn. of: HRC-010

To: Mr. J. N. Hall
Division Engineer (HDF-17.25)
Western Federal Lands Highway Division

FACTS

The FHWA acquired a strip of land located along the St. Joe River in Idaho from the Potlatch Corporation. This section of land was previously used as railroad right-of-way and landing area and is surrounded by other land owners, including the Potlatch Corporation.

The State of Idaho's Department of Health and Welfare (Division of Environmental Quality) has allegedly discovered petroleum contamination in the St. Joe River adjacent to these properties. The State of Idaho wants the adjacent landowners to institute actions to abate and clean up this petroleum contamination and as authority for this the State cites the Idaho Code regarding nuisance law. (Attachment)

LAW

There are various forms of common law nuisance. A private nuisance is a substantial and unreasonable interference with a private party's use or enjoyment of land. A public nuisance, on the other hand, is substantial and unreasonable interference with the health, safety or property rights of the community. Both these types of nuisances are classified as either nuisances per se and nuisances in fact. A nuisance per se is generally defined as an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, while a nuisance in fact is commonly defined as an act, occupation, or structure not a nuisance per se, but one which may become a nuisance by reason of circumstances, location, or surroundings. Denny v. United States, 185 F.2d 108 (10th Cir. 1950).

The State of Idaho has cited authority which defines a nuisance broadly and imposes liability to abate the nuisance on successive owners even if these owners were innocent purchasers who were unaware of the nuisance. If the FHWA were a private party, perhaps these Idaho statutes could impose liability for the nuisance allegedly caused from our property.

The FHWA, however, is not a private party but is part of the Federal Government which has certain immunities. The United States as sovereign is immune from lawsuits unless it consents to be sued. United States v. Testan, 424 U.S. 392 (1976). Moreover, this consent cannot be implied but must be unequivocally expressed. United States v. King, 395 U.S. 1 (1969).

The United States has waived its sovereign immunity for certain tortious actions, however, through the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq. The FTCA states "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C. § 2674. Further, both the statute governing the United States as a defendant and the FTCA only allow tort claims against the United States for a "negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b) and 28 U.S.C. § 2675(a).

In Dalehite v. United States, 346 U.S. 15 (1953), the United States Supreme Court ruled on bringing nuisance or other non-negligent tortious actions under the FTCA. The Dalehite court said this in discussing nuisance and the concept of strict liability or liability without fault:

> "The Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tort feasor conducts himself." Id. at 44.

The United States Supreme Court has continued to hold that tort suits against the United States arising in strict or absolute liability are not actionable. Laird v. Nelms, 406 U.S. 797, 799 (1972). The Ninth Circuit Court of Appeals has followed these Supreme Court cases. Borquez v. United States, 773 F.2d 1050 (9th Cir. 1985); Thompson v. United States, 592 F.2d 1104, 1107 (9th Cir. 1979). Therefore, since nuisance actions impose liability without fault, they cannot be brought pursuant to the FTCA; and since the FTCA is the only way the United States has consented to be sued for tortious actions like nuisance, the Idaho Code does not provide the State authority to demand action or compensation by us regarding this petroleum contamination.

Another reason the State of Idaho's nuisance theory must fail is that the FTCA is only for "sum certain" money damages. The FTCA does not provide an injunction remedy, i.e., make the United States perform a clean-up action. 28 U.S.C. § 2675; Hatahley v. United States, 351 U.S. 173 (1956); Moon v. Takisaki, 501 F.2d 289 (9th Cir. 1974).

CONCLUSION

If the State of Idaho bases its authority for us to clean up petroleum contamination on a nuisance theory, it must fail. The United States, has not waived its sovereign immunity for nuisance actions under the FTCA and, therefore, we cannot be required to abate this problem allegedly occurring on property we own or be liable for its costs.

Lawrence P. Hanf

Attachment:
Letter 3/31/89